

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

KINSALE INSURANCE COMPANY,

Plaintiff,

V.

STEVEN MARTINEZ and BERTHA BLANCA MARTINEZ, both individually and as next friends of JULIA LEE MARTINEZ and ISABELLA BLANCA MARTINEZ, QUALITY SOUTH TEXAS TRUCKING, INC., and FRED GONZALEZ,

Defendants.

CIVIL ACTION NO: 5:19-cv-00161

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

KINSALE INSURANCE COMPANY (“Kinsale”) files suit against STEVEN MARTINEZ and BERTHA BLANCA MARTINEZ, both individually and as next friends of JULIA LEE MARTINEZ and ISABELLA BLANCA MARTINEZ (together, “Martinez”), QUALITY SOUTH TEXAS TRUCKING, INC. (“Quality South”), and FRED GONZALEZ, and alleges:

NATURE OF ACTION

1. This is an action for damages and declaratory relief under 28 U.S.C. § 2201 to establish that there is no coverage under commercial general liability and commercial excess liability policies Kinsale issued to Quality South for workplace injuries sustained by Steven Martinez while he was allegedly working as an independent contractor for Quality South.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1332 because there is diversity of citizenship and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

3. Venue is proper in this district since “a substantial part of the events ... giving rise to the claim occurred” in this district and Martinez’s underlying lawsuit is pending in Webb County, Texas. *See* 28 U.S.C. § 1391(b)(2).

4. All conditions precedent have occurred, been performed, or have been waived.

THE PARTIES

5. Kinsale is an Arkansas corporation with its principal place of business in Richmond, Virginia. Kinsale does business in Texas as a surplus lines insurer. Pertinent here, Kinsale issued a commercial general liability policy to Quality South as the Named Insured, bearing Policy No. 0100055226-0 and effective from 08/18/2017 to 08/18/2018. Kinsale also issued a commercial excess liability policy to Quality South as the Named Insured, bearing Policy No. 0100055227-0 and effective from 08/18/2017 to 08/18/2018.

6. Quality South is a Texas corporation with its principal place of business in Driscoll, Texas.

7. Gonzalez is a resident of Nueces County, Texas and is a shareholder or principal of Quality South. For this action, he too was sued by Martinez in the underlying lawsuit.

8. Steven Martinez is a resident of Jim Wells County, Texas. The underlying lawsuit was filed for injuries Mr. Martinez sustained while working as an independent contractor for Quality South. Bertha Martinez is the wife of Steven Martinez and is a resident of Jim Wells County, Texas.

THE CRUX OF THE UNDERLYING TORT LAWSUIT IS THAT STEVEN MARTINEZ WAS INJURED WHILE WORKING AS AN INDEPENDENT CONTRACT DRIVER FOR QUALITY SOUTH

9. On June 14, 2018, Steven Martinez and his wife, Bertha Martinez, filed the underlying tort lawsuit styled: *Steven Martinez and Bertha Blanca Martinez, both individually and as next friends of, Julia Lee Martinez and Isabella Blanca Martinez, minor children v.*

Trinidad Drilling; SM Energy Company, Fred Gonzalez; and Quality South Texas Trucking, Inc., Cause No. 2018-CVF-001195D3, in the 341st Judicial District Court of Webb County, Texas.

10. On November 25, 2019, Steven and Bertha Martinez filed their second amended petition, which is their operative pleading in the underlying tort lawsuit. A copy of the second amended petition is attached as Exhibit “A.”

11. Steven and Bertha Martinez allege that Fred Gonzalez is the owner of Quality South. (Second Amended Petition, pg. 3/16.)

12. Steven and Bertha Martinez also allege that non-parties SM Energy Company (“SM Energy”) and Trinidad Drilling (“Trinidad”) hired Quality South and Mr. Gonzalez to transport a drilling rig. (*Id.*)

13. Quality South and Mr. Gonzalez allegedly hired Mr. Martinez as an independent “contract driver” to help with the rig move. (*Id.*)

14. On November 3, 2017, Mr. Martinez was allegedly working “as a contract driver for ... Gonzalez and ... [Quality South]” while Mr. Gonzalez used a crane to load “a tandem truck onto a low-boy trailer” as part of the rig move. (*Id.*)

15. Mr. Martinez’s right leg was allegedly crushed by the crane during this work. (*Id.*, pg. 4/16.)

16. Mr. Martinez’s right leg was eventually amputated because of his injuries. (*Id.*, pg. 6/16.)

17. The amended petition includes two counts for negligence and gross negligence, which are both alleged against Quality South and Mr. Gonzalez. In the first count, Martinez alleges Quality South and Mr. Gonzalez were negligent by failing to supervise and ensure that the work was done in a safe manner. The second count for gross negligence is based on similar

allegations. In particular, the second count includes an allegation that Quality South and Mr. Gonzalez “were grossly negligent in allowing the rig move to continue given its crane operator was fatigued and working excessive hours as well as the flagger not stopping the crane before it crushed Plaintiff Martinez’s foot.” (*Id.*, pg. 9/16.) The gross negligence count is alleged against Quality South and Mr. Gonzalez.

18. In the second amended petition, Martinez seeks damages, including exemplary damages for the alleged gross negligence of Quality South and Mr. Gonzalez.

THE KINSALE COMMERCIAL GENERAL LIABILITY POLICY

19. Kinsale issued a new, commercial general liability policy to Quality South as the Named Insured, bearing Policy No. 0100055226-0 and effective from 08/18/2017 to 08/18/2018. A copy of the CGL policy is attached as Exhibit “B.”

20. The CGL policy includes a “Limitation – Independent Contractors” endorsement. (*See* Form CAS4020 0110.) This endorsement provides in pertinent part:

LIMITATION – INDEPENDENT CONTRACTORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE

The following exclusion is added to this policy:

This insurance does not apply to any claim or “suit” for “bodily injury”, “property damage” or “personal and advertising injury” arising directly or indirectly out of, related to, or, in any way involving acts of independent contractors or subcontractors contracted by you or on your behalf unless at the time the “bodily injury”, “property damage” or “personal and advertising injury” occurs:

1. The independent contractor or subcontractor contracted by you or on your behalf:

- a. Maintains insurance coverage with limits of insurance equal to or greater than the insurance coverage and limits of insurance` provided by this policy; and
 - b. Provides you with an endorsement or certificate of insurance indicating that you have been added to the independent contractor's or subcontractor's policy as an Additional Insured; and
 - c. Provides you with an endorsement or certificate indicating that the independent contractor's or subcontractor's insurance company has agreed to provide a Waiver of Subrogation endorsement in your favor; and
2. The contracts with the independent contractor or subcontractor you have hired contain hold harmless and indemnity agreements in your favor, indemnifying you against any losses or expenses arising from or related to work performed for you or on your behalf by such independent contractor or subcontractor.

21. The CGL Policy also includes a "Duty to Defend Exclusion," which is included in the policy's "Additional Policy Exclusions" endorsement. (*See* Form CAS3043 0817.) The Duty to Defend Exclusion provides in pertinent part:

DUTY TO DEFEND EXCLUSION

Where there is no coverage under this policy, there is no duty to defend.

THE KINSALE COMMERCIAL EXCESS LIABILITY POLICY

22. Kinsale also issued a commercial excess policy to Quality South as the Named Insured, bearing Policy No. 0100055227-0 and effective from 08/18/2017 to 08/18/2018. A copy of the excess policy is attached as Exhibit "C."

23. The principal coverage form of the excess policy is CAX001 0817. The principal coverage form provides in pertinent part:

SECTION I- COVERAGE

A. INSURING AGREEMENT

We will pay on behalf of the Named Insured those sums in excess of the "underlying insurance" that you become legally obligated to pay as

damages because of injury or property damage to which this insurance applies, provided that the damages would be covered by the “underlying insurance(s)”, but for the exhaustion of the applicable Limits of Insurance.

...

This policy will not, in any event, provide broader coverage than that provided by the “underlying insurance”. ...

SECTION II- DEFINITIONS

1. “Primary insurance” means the “underlying insurance” policy(ies) listed as “primary insurance” in the Schedule of Underlying Insurance forming a part of this policy.

2. “Underlying insurance(s)” - means:

All policies or self insurance, including the “primary insurance”, listed in the Schedule of Underlying Insurance and any replacements or renewals of them, provided that such replacement or renewal policy(ies) provide coverage equivalent to and afford limits of insurance equal to or greater than the policy(ies) being renewed or replaced.

COUNT I – NO COVERAGE UNDER THE LIMITATION – INDEPENDENT CONTRACTORS ENDORSEMENT

24. Kinsale incorporates paragraphs 1 through 23.

25. Steven and Bertha Martinez allege that Mr. Martinez was injured while working as an independent contract driver for Quality South.

26. The Limitation – Independent Contractors endorsement bars coverage for bodily injury arising directly or indirectly out of, related to, or, in any way involving independent contractors contracted by or on behalf of Quality South.

27. Accordingly, Kinsale has no duty to defend or indemnify Quality South or Mr. Gonzalez in the underlying tort lawsuit under the policies issued to Quality South.

COUNT II – NO COVERAGE FOR EXEMPLARY OR PUNITIVE DAMAGES UNDER THE INSURING AGREEMENTS AND BASED ON PUBLIC POLICY

28. Kinsale incorporates paragraphs 1 through 23.

29. The insuring agreement of each Kinsale policy is only triggered by “bodily injury” that occurs during the policy period and is caused by an “occurrence.”

30. It is against public policy to allow coverage for exemplary or punitive damages because of gross negligence.

31. Martinez seeks exemplary or punitive damages for the gross negligence of Quality South and Mr. Gonzalez, which are not insurable based on public policy and do not qualify as damages for “bodily injury.”

32. Accordingly, Kinsale has no duty to defend or indemnify Quality South or Mr. Gonzalez from any exemplary or punitive damages sought by Martinez in his underlying tort lawsuit.

REQUESTED RELIEF

Kinsale respectfully requests that this Court:

- a. Adjudicate the rights of the parties under the Kinsale policies;
- b. Find and declare that Kinsale does not have a duty to defend Quality South or Mr. Gonzalez in the underlying tort action;
- c. Find and declare that Kinsale does not have to pay any judgment against Quality South or Mr. Gonzalez in the underlying tort action, including any judgment awarding exemplary or punitive damages to Martinez;
- d. Find and declare that Kinsale’s policies do not provide any coverage for exemplary or punitive damages;
- e. Award Kinsale, from Quality South and Mr. Gonzalez, all the attorney’s fees and costs that Kinsale incurred to provide Quality South and Mr. Gonzalez with a defense in the underlying tort action; and
- f. Award Kinsale its costs in this action, as well as any other relief that this Court deems, equitable, just, and proper.

Respectfully Submitted,

/s/ Lisa M. Henderson

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